In this case, an action of tort for the fall of the chimney of a planing mill, caused by a heavy but not unusual gale, the lower court had charged that the ordinary rule of negligence was the test of liability. On exceptions to this charge, the upper court sustained the exceptions, and decided that, whatever the rule was, it was not the ordinary unqualified rule of due care. In the lower court, it appears, the plaintiff had requested instructions, which roughly but practically embodied the modified doctrine of *Fletcher* v. *Rylands* now prevailing in England (5 H. L. R. 186, note 1). As this doctrine was, however, considered by the upper court as giving the plaintiff more than he was entitled to, the question naturally arises, since both the ordinary rule of negligence and that of *Fletcher* v. *Rylands* (a case nowhere expressly mentioned in the decision) appear equally wrong, what is the correct test in the present case? On this point the court's views are decidedly ambiguous. In one place it seems to approach the "ordinary care" rule, in another to adopt a sort of modified *Fletcher* v. *Rylands* rule, in which the defendant is not liable for latent defects which no human foresight could reasonably be expected to anticipate or prevent; in short, after destroying much, the court constructs nothing. What, then, is this case to stand for?

Some light is shed upon this point by the authorities cited. The long line of Massachusetts cases, and the fact that some English decisions are also relied upon, might well lead one to regard the attitude of the court as significant of an unwilling deference to what it could not easily disregard. It does not look *Fletcher* v. *Rylands* squarely in the face. If it approaches that peculiar case at all, it is only by being dragged backwards in its direction; if it adopts it at all, it is only with such sweeping qualifications as to reduce that doctrine to hardly more than that of those cases where, though the want of due care is a necessary element of liability, the mere occurrence of the accident is held to raise a presumption of negligence. It would seem, moreover, that the court's citation of Pollock on Torts, 393, 394, which is practically an authority for the view last mentioned, expresses a strong leaning that way. In any case, the decision bodes ill for the future of *Fletcher* v. *Rylands*, in Massachusetts at least.

LAIDLAW *v.* RUSSELL SAGE (THE DYNAMITE CASE) GOES TO A THIRD TRIAL. — The Supreme Court of New York, General Term, on October 13th, reversed a judgment of the Circuit Court which had been rendered in favor of the plaintiff in the case of *Laidlaw* v. *Sage*, and ordered the case to a third trial (30 N. Y. Sup. 496).

In the HARVARD LAW REVIEW for January, 1894, the opinion of the Supreme Court in this same case, reversing a judgment of the Circuit Court and ordering the case to its second trial, was noticed, the circumstances of the case were stated, and it was suggested that the discussion of the "burden of proof" by the Supreme Court seemed not wholly satisfactory. That suggestion appears to have been justified by the fact that Mr. Justice Patterson of the Circuit Court, at the second trial, was so far misled that he read to the jury an extract from the opinion of the General Term, the effect of which was to charge that the plaintiff was entitled to a recovery unless the defendant should show that the plaintiff's injuries would have been as serious as they were if he had not been interfered with. The Supreme Court now say clearly that this charge was erroneous, and a misrepresentation of their conception, which

would not have been possible, had the trial judge not separated the extract which he read to the jury from the context. The conception which the Supreme Court meant to enunciate was, that, if the plaintiff should be able to make out a *prima facie* case for the jury, the burden of going forward with the evidence, with a view to destroying the plaintiff's case, would rest upon the defendant. This is clearly sound law.

It was said in the note which has been referred to, that at the next trial the defendant would probably advance the theory that his act was instinctive, and ask for an instruction to the jury that, if his action was involuntary, and such as would instinctively result from a sudden and irresistible impulse to escape a terrible danger, he was not liable to the plaintiff for the consequences of it. It was submitted further, that it was difficult to see how such an instruction could be refused. On the second trial the defendant's counsel requested the court to charge that, "If the jury find from the evidence that the defendant did take the plaintiff and use him as a shield, but that this action was involuntary, or such as would instinctively result from a sudden and irresistible impulse in the presence of a terrible danger, he is not liable to the plaintiff for the consequences of it." The court declined to give the instruction precisely in the words requested, but charged instead, that the essence of the liability must be a voluntary act. The Supreme Court (Van Brunt, P. J.) now declare that this was error, and that the defendant was entitled to have the instruction which he asked for submitted to the jury. "The essence of the liability," the court says, "is not whether the act of Sage was voluntary or not. An instinctive act may be voluntary; an act done upon the spur of the moment, in anticipation of impending evil, may be voluntary. But such acts are not the result of an intent based upon reasoning." If the act of the defendant was of this character, the court appears to believe that he ought not to be held liable for the consequences of it.

COLLATERAL INHERITANCE TAX. — The case of *Minot* v. *Winthrop*, decided October 17, 1894, by the Supreme Court of Massachusetts, involves some points of more than local importance. It raises the question whether the St. 1891, c. 425, imposing a collateral inheritance tax, is constitutional. One of the objections urged against this statute was that the right of succession was a necessary incident of property, protected by the Constitution of Massachusetts and that consequently the State could not tax it. As was to be expected, the court declined to take this view and upheld the statute. (There is a dissenting opinion, but on another point.) The court holds that the State has full power to regulate the devolution of property on the death of the owner, subject only to the limitations that such regulation be reasonable, and that no property be taken, either by taxation or directly, except for the public service. To conclude from this, as the court does, that the State could not take away altogether the inheritable quality of property is to go further than is necessary in this case. Undoubtedly the private inheritance of property is, in some measure, a social necessity in our age, and an abolition of it would at present be neither reasonable nor a taking of property for the public service. But the Constitution is a growth, and it is conceivable, though not likely, that a time might come when such a measure might be very differently viewed, even under the present Constitution.

Aside from these limitations, however, whose severity may vary with